

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

LEONA LOUISE SUTTON,

Defendant.

No. 2: 11-CR-0151-WFN-1

ORDER DENYING
MOTION TO VACATE

A motion hearing was held April 20, 2016, to address Defendant's Motion to Vacate Conviction Pursuant to 18 U.S.C. § 2255. Matthew Campbell represented the Defendant; Assistant United States Attorney George Jacobs, III, represented the Government. Defendant's presence was waived due to the purely legal nature of the Motion. The Court heard argument and took the matter under advisement.

Defendant has established that the Court has jurisdiction under § 2255, and arguably, the Motion is timely, though it may in fact be premature. "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made

1 retroactively applicable to cases on collateral review; or (4) the date on which
2 the facts supporting the claim or claims presented could have been discovered
through the exercise of due diligence.

3 28 U.S.C.A. § 2255 (West). In June 2015, the Supreme Court invalidated the residual clause
4 in 18 U.S.C. § 924(e). *Johnson v. United States*, 135 S. Ct. 2251 (2015). Recently the
5 Supreme Court ruled that the newly recognized right announced in *Johnson* is retroactive.
6 *Welch v United States*, __ S. Ct. ___, 2016 WL 1551144 (April 18, 2016).

7 Defendant argues that the Court should extrapolate from the Supreme Court's
8 invalidation of the 18 U.S.C. § 924(e) residual clause in *Johnson* to invalidation of the
9 residual clause in § 924(c). According to Defendant, the Supreme Court first recognized
10 that § 924(c)(3)(B) is overbroad when *Johnson* was decided and therefore the Motion is
11 timely. The language in § 2255 is clear that the newly recognized right must be recog-
12 nized by the Supreme Court. As discussed more thoroughly below, the Court appreciates
13 similarities between § 924(e) and § 924(c) and further accepts that the Ninth Circuit found
14 identical statutory language to § 924(c) to be unconstitutional in *Dimaya v. Lynch*, based
15 on the Supreme Court's ruling in *Johnson*.¹ 803 F.3d 1110 (9th Cir. 2015). However, the
16 Supreme Court has not addressed the constitutionality of § 924(c) which while similar,
17 does differ from § 924(e). It appears that Defendant relies on a not yet established right
18 rather than a newly recognized right. Consequently, the Motion may be premature, but in
19 light of the likelihood that the Supreme Court will recognize the right in the future and the
20 following analysis, the Court moves to the merits of the Motion.

21 Defendant convincingly argues that the residual clause in § 924(c)(3)(B) suffers
22 from the same deficiencies as those found in § 924(e). In the *Johnson* opinion, Justice
23 Scalia pointed to two factors that in combination rendered § 924(e) unconstitutionally
24 vague: (1) lack of certainty on how to estimate the risk posed by a crime due to the
25 reliance on generic elements rather than real-world facts; (2) the quantum of risk posed to

27 ¹ *Dimaya* examined 18 U.S.C. § 16(b). *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir.
28 2015).

1 qualify as a violent felony. *Johnson v. United States*, 135 S. Ct. 2251, 2558 - 59 (2015).
2 The unsettled litigation creating a judicial morass caused by courts attempting to define
3 which convictions qualified as violent felonies also indicated that the residual clause was
4 too vague. *Id.*

5 The residual clause of § 924(c) defines a crime of violence as a felony "that by
6 its nature, involves a substantial risk that physical force against the person or property
7 of another may be used in the course of committing the offense." The Ninth
8 Circuit examined an identical residual clause found in the immigration code and deter-
9 mined that it "requires courts to inquire whether the conduct encompassed by the elements
10 of the offense, in the ordinary case, presents a substantial risk of force" just as prohibited
11 by *Johnson*. Accordingly, the Ninth Circuit invalidated the unconstitutionally vague
12 definition of crime of violence "an offense that is a felony and . . . that by its nature,
13 involves a substantial risk that physical force against the person or property of another may
14 be used in the course of committing the offense." 18 U.S.C. § 16(b). Thus, despite the
15 several differences the Government notes between § 924(e) and § 924(c), there is an
16 extremely high likelihood, perhaps even a certainty, that the Ninth Circuit will eventually
17 determine that § 924(c)(3) is unconstitutionally vague.

18 However, even without the residual clause, Defendant's conviction stands if the
19 "crime of violence" is a felony that "has as an element the use, attempted use, or threatened
20 use of physical force against the person or property of another." Defendant went to trial
21 and was convicted by a jury on both counts of the Indictment. The jury instructions for
22 Count 2 of the Indictment charging Discharge of Firearm During Commission of Crime of
23 Violence, 18 U.S.C. § 924(c)(1)(A), indicated that, to prove that the Defendant was guilty
24 of Count 2, the Government has to prove that "First, the Defendant, Ms. Sutton, committed
25 the crime of assault with a dangerous weapon in Indian Country as charged in Court 1 of
26 the Indictment, which *I instruct you is a crime of violence. . .*" (emphasis added). Once
27 convicted, the Court then sentenced Defendant pursuant to § 924(c)(1)(A)(iii) without
28 objection from Defendant. *See* ECF No. 143. At no point did the parties discuss which

1 subsection they relied upon when agreeing that the charge in Count 1 constituted a
2 crime of violence as defined in § 924(c)(3). However, court records consistently cite
3 § 924(c)(1)(A) and not the residual clause.

4 The Court and parties properly relied upon § 924(c)(1)(A) when agreeing that
5 assault with a dangerous weapon is a crime of violence. Pursuant to *Descamps*, the Court
6 must first compare the elements of assault with a dangerous weapon to the statutory
7 definition of a crime of violence. *Descamps v. United States*, 133 S. Ct. 2276 (2013). If
8 the elements of the conviction exceed the generic definition of a crime, the Court then
9 must examine the elements of the prior conviction to determine if the statute is divisible.
10 *Id.* A divisible statute defines elements in the alternative in essence creating separate
11 crimes in a single statute. *Descamps*, 133 S. Ct. at 2284. The touchstone for determining
12 divisibility is whether or not the jury must make a determination of the facts supporting
13 the generic crime. *Rendon v. Holder*, 764 F.3d 1077, 1084-90 (9th Cir. 2014). "By
14 contrast, a statute is indivisible if the jury may disagree on the fact at issue yet still
15 convict." *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015).

16 Upon examination of the elements and statutory language defining, the Court
17 concludes that Assault with a Dangerous Weapon has an element requiring the use,
18 attempted use, or threatened use of physical force. Therefore, the constitutionality of the
19 residual clause found at § 924(c)(1)(B) has no bearing on Defendant's sentence. Physical
20 force "means violent force—that is, force capable of causing physical pain or injury to
21 another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). In *Johnson*, the
22 Supreme Court determined that a statute permitting conviction for actual and intentional
23 touching could not qualify as a violent felony because the level of force required was not
24 sufficiently substantial to meet the requirement of "physical" force. Mere possession of a
25 weapon while engaging in an offensive touch is likewise insufficient to qualify as physical
26 force. *United States v. Werle*, 815 F.3d 614, 620 (9th Cir. 2016). Similarly, assault on a
27 federal officer cannot qualify as a crime of violence under the use of force provision
28 because "[t]o obtain a § 111(a) felony conviction . . . the government need not prove, and

1 an adjudicator need not find, that the offense involved violent force capable of causing
 2 physical pain or injury." *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th
 3 Cir. 2014). Contrarily, a statute that requires that the Defendant "willfully inflicts upon a
 4 person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the
 5 mother or father of his or her child, corporal injury resulting in a traumatic condition"
 6 qualifies as a crime of violence under force clause when applying U.S.S.G. § 2L1.2.²
 7 *United States v. Ayala-Nicanor*, 659 F.3d 744, 748 (9th Cir. 2011).

8 Assault with a Dangerous Weapon pursuant to 18 U.S.C. § 113(a)(3) is "assault with
 9 a dangerous weapon, with the intent to do bodily harm." To find a person guilty the
 10 Government must prove,

11 First, the defendant assaulted [name of victim] by intentionally [[striking]
 12 [wounding]] [[him] [her]] [using a display of force that reasonably caused
 13 [him] [her] to fear immediate bodily harm];

14 Second, the defendant acted with the intent to do bodily harm to [name of
 15 victim];

16 Third, the defendant used a dangerous weapon; and

17 Fourth, the assault took place on [specify place of federal jurisdiction].

18 Ninth Circuit Manual of Model Criminal Jury Instructions (2016). Unlike statutes that
 19 criminalize offensive touching, § 113(a)(3) requires that a person strike, wound, or display
 20 force with the intent of causing injury in conjunction with the subjective intent to actually
 21 cause bodily harm to the victim. That level of force is sufficient to meet the threshold of
 22 physical force. It also closely resembles the level of force described in the *Ayala-Nicanor*
 23 case. Though defense counsel can imagine situations that could possibly not require the
 24 proper quantum of force to qualify as physical force, "in order for a statute to be
 25

26 ² A crime of violence pursuant to U.S.S.G. § 2L1.2 is any of the enumerated crimes
 27 listed in Application Note 1(B)(iii) or any other offense that "has as an element the use,
 28 attempted use, or threatened use of physical force against the person of another."

overinclusive there must be a realistic probability, not merely a theoretical possibility, that the State would apply its statute to conduct outside the federal generic definition." *Werle*, 815 F.3d at 620. There is no hint that § 113(a)(3) has been applied in a manner requiring less than the use or threatened use of physical force.

The Court concludes that § 113(a)(3) qualifies as a crime of violence pursuant to § 924(c)(3)(A). Any arguable newly recognized right springing from *Johnson* does not apply to Defendant's conviction.

CERTIFICATE OF APPEALABILITY

An appeal of this Order may not be taken unless this Court or a circuit justice issues a certificate of appealability finding that "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2013). This requires a showing that "reasonable jurists would find the district Court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based on the Court's preceding analysis, the Court concludes that jurists of reason may differ with the Court's conclusion. Thus, a certificate of appealability should issue. The Court has reviewed the file and Motion and is fully informed. Accordingly,

IT IS ORDERED that Defendant's Motion to Vacate Conviction Pursuant to 18 U.S.C. § 2255, filed March 23, 2016, **ECF No. 161**, is **DENIED**.

The District Court Executive is directed to:

- File this Order,
- Provide copies to counsel,
- Inform the Ninth Circuit Court of Appeals that if the Defendant files a Notice of Appeal that a certificate of appealability is **GRANTED**; AND
- **CLOSE** the corresponding civil file, 2:16-CV-0083-WFN.

DATED this 26th day of April, 2016.

s/ Wm. Fremming Nielsen

WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE

04-25-16